

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

UNITED STATES OF AMERICA, )  
                                  )  
Plaintiff,                    )  
                                  )  
v.                            )  
                                  )  
                                  ) No. 4:11-CR-238 RWS  
                                  )  
STEPHEN E. VIERLING,        )  
                                  )  
Defendant.                    )

SENTENCING HEARING  
BEFORE THE HONORABLE RODNEY W. SIPPEL  
UNITED STATES DISTRICT JUDGE  
OCTOBER 28, 2011

APPEARANCES:

For Plaintiff: Michael W. Reap, Esq.  
OFFICE OF U.S. ATTORNEY  
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St. Louis, MO 63102

For Defendant: Sanford J. Boxerman, Esq.  
David Capes, Esq.  
CAPES AND SOKOL  
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For Movant: David W. Harlan, Esq.  
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REPORTED BY: SHANNON L. WHITE, RMR, CRR, CSR, CCR  
Official Court Reporter  
United States District Court  
111 South Tenth Street, Third Floor  
St. Louis, MO 63102  
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1 (PROCEEDINGS STARTED AT 11:05 AM.)

2 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT AND WITH  
3 THE DEFENDANT PRESENT:)

4 THE COURT: Morning. We are here today in the case  
5 styled United States of America against Stephen Vierling,  
6 Cause No. 4:11-CR-238. Would counsel make their appearances,  
7 please?

8 MR. REAP: Michael Reap for the United States.

9 MR. BOXERMAN: Sanford Boxerman for Mr. Vierling, and  
10 here with me is David Capes, who's also been representing Mr.  
11 Vierling in this matter.

12 THE COURT: And Mr. Vierling is present; is that  
13 correct?

14 MR. BOXERMAN: Yes, sir.

15 THE COURT: Counsel, have you and Mr. Vierling had  
16 the opportunity to read, review, and discuss the presentence  
17 report in this matter?

18 MR. BOXERMAN: We have, Your Honor.

19 THE COURT: On behalf of Mr. Vierling, are there any  
20 objections to the factual statements in the presentence  
21 report?

22 MR. BOXERMAN: There is -- well, there are objections  
23 that we filed, and I have no additional objections beyond  
24 what's been filed. We do object to one of the components of  
25 restitution that's been suggested in the report by the

1 probation officer.

2 And I think we have some other objections that may or  
3 may not need to be ruled upon or may be ruled upon just in the  
4 course of the Court rendering its judgment, but that's our  
5 primary objection today.

6 THE COURT: All right. Well, let's go through your  
7 objections, starting with paragraph 14 and 15. I mean, rarely  
8 do you object to everything in a paragraph, so tell me what  
9 specific factual allegations in paragraph 14 are objected to.

10 MR. BOXERMAN: Well, to the extent paragraph 14 reads  
11 as though Mr. Vierling came forward and from the beginning  
12 said that the amount he embezzled was \$400,000, we object to  
13 that. There was some discussion about what the \$400,000  
14 figure represented, but it was not the scope of the  
15 embezzlement.

16 I don't know that the Court necessarily has to rule  
17 on this objection, but it's something we wanted to bring to  
18 the Court's attention because we didn't want it to go  
19 unremarked upon to the extent that paragraph 14 read that way.

20 THE COURT: So you would object to the penultimate  
21 sentence in paragraph 14; is that right? It's the only place  
22 I see a reference to his representation as to an estimation as  
23 to the amount.

24 MR. BOXERMAN: Yes. But you know, the final sentence  
25 of the paragraph sort of clears that up.

1 MR. REAP: It does.

2 MR. BOXERMAN: So I think -- you know, I did these  
3 objections when we only had the --

4 THE COURT: When you had the preliminary disclosure.

5 MR. BOXERMAN: Right. So now that I look at that  
6 last sentence, I think that Ms. Kintz did what I asked her to  
7 do, which is clarify that for us.

8 THE COURT: Do you think that's a fair and accurate  
9 representation of the --

10 MR. BOXERMAN: Yes, yes.

11 THE COURT: All right. All right. So the objection  
12 to paragraph 14 has been satisfied by the amendment by the  
13 probation office in the final version.

14 MR. BOXERMAN: Yes.

15 THE COURT: All right. So that objection is now  
16 moot. As to paragraph 15?

17 MR. BOXERMAN: I would say the same thing, that it's  
18 now been handled appropriately, so it's been mooted by the  
19 revision of the presentence report from the disclosure copy to  
20 the final copy.

21 THE COURT: Only. Let's go to paragraph 68.

22 MR. BOXERMAN: The objection there is to the last  
23 sentence, but it's not a factual objection. We don't object  
24 to the factual material that the probation officer has put in  
25 her report. It's a matter that the Court will have to decide.

1 THE COURT: That's an opinion. It's not a fact.

2 MR. BOXERMAN: Correct.

3 THE COURT: Or recommendation, if you will, by  
4 probation, essentially to me but subject to argument by  
5 counsel and the parties. Paragraph 80?

6 MR. BOXERMAN: That's the one that I was referring to  
7 above. We do object that the restitution figure should not  
8 include these \$200,000 forensic accounting fees.

9 THE COURT: So that would be the last full sentence  
10 of paragraph 80; is that right? And then the amount that's  
11 included in the loss amount to City Lighting Products.

12 MR. BOXERMAN: That's correct, Your Honor.

13 THE COURT: Okay. And that amount is \$200,055.20.

14 MR. BOXERMAN: That is correct.

15 THE COURT: Mr. Reap, I turn to you to put on any  
16 evidence you wish as to that.

17 MR. REAP: Judge, I'm not going to put any evidence  
18 on. I think I have responded to this issue in documents that  
19 we have filed under seal because the victim has filed  
20 pleadings under seal, and we've responded appropriately. Mr.  
21 Boxerman and his client have seen all of those pleadings and  
22 our responses.

23 And frankly, as to the forensic accounting costs, not  
24 the direct embezzlement, we think there were multiple purposes  
25 of doing that, and frankly, that work was really done, not

1 that they didn't have the right to do it themselves  
2 independently, but it was done first of all by the defendant  
3 internally with his lawyers and employees that had accounting  
4 background, and then when we got involved, the Government, in  
5 August of 2007, we went over those figures.

6 So as far as the actual embezzlement, we very early  
7 in this investigation had a pretty good idea of what we were  
8 dealing with, and we don't necessarily think that those  
9 restitution, the accounting figures, should be applied as  
10 mandatory restitution.

11 THE COURT: Mr. Boxerman?

12 MR. BOXERMAN: Well, if the Government's -- I mean,  
13 my view of this, we've made our objection. If the Government  
14 is not presenting evidence on the point, then the objection  
15 should be sustained and that part of it should come out of the  
16 restitution calculation.

17 MR. REAP: Now, I would also like to, at least for  
18 the record, suggest that all pleadings, including victim  
19 information on this issue, went to the probation office; so in  
20 other words, they've got all of the supporting data for all of  
21 these figures and how we came to the conclusion that as far as  
22 the direct embezzlement, (A), it should be the two hundred and  
23 ninety-two thousand and some change, and the analysis of the  
24 forensic accounting costs they have presented added to the  
25 probation office. So I don't know what else -- as far as

1 actual testimony, we're not going to put anything on.

2 THE COURT: Okay. Mr. Harlan, it's a little unusual,  
3 but I mean, the United States Attorney is in charge of its  
4 prosecution, but obviously you wish to be heard at this  
5 moment.

6 MR. HARLAN: I would like to be heard on this  
7 specific point, Your Honor. We submitted papers to the court,  
8 an affidavit of Donna Beck Smith of Brown Smith Law. She was  
9 the forensic accountant in charge of the audit. Her  
10 declaration indicated that the \$200,000, which was spent only  
11 to conduct a forensic audit to identify amounts embezzled by  
12 Mr. Vierling, her declaration had bills attached to it. There  
13 was also a declaration from Mr. McCartney, the current CFO of  
14 the company, indicating that that was the purpose of the  
15 audit.

16 And the factual setting in which this occurred I  
17 think is important to the Court, for the Court to understand.  
18 Mr. Vierling quit on short notice on October 4, 2007, the day  
19 that the company's offices were raided. The company was left  
20 without a chief financial officer. They began to try and  
21 understand what had occurred, and they found company records  
22 were missing. These were records that turns out that had a  
23 direct bearing on the embezzlement. The company had tax  
24 returns, financial statements to prepare for its banks, and it  
25 had to figure out the exact position it was in.

1                   The Government during this period was aware that  
2 there had been an embezzlement, but they didn't communicate  
3 that information to City Lighting or its attorneys until  
4 sometime after the audit was complete, and we think that this  
5 situation is just like the situation in the DeRosier case  
6 that's cited in our papers where this audit and cost of it was  
7 a direct result of the embezzlement, so I'll . . .

8                   THE COURT: Any response other than what's previously  
9 been --

10                  MR. REAP: Well, the raid occurred under  
11 court-ordered search warrant out of this courthouse. Well,  
12 individuals of the company were told of the nature of the  
13 investigation, both corporate and individual. And I don't  
14 want to be quoted on this, and maybe Mr. Harlan can help my  
15 memory. I think early on I know there was at least an early  
16 meeting where the defense team brought to my attention what I  
17 already knew: That Mr. Vierling had embezzled some money.  
18 And I told them I was aware of that, and but for whatever  
19 reasons they did this audit. I think I would suggest they  
20 were multiple because they were clearly told the nature of the  
21 investigation, which was twofold, and I said that in my sealed  
22 pleadings in response to their sealed documents.

23                  THE COURT: How much of --

24                  MR. REAP: And frankly --

25                  THE COURT: -- this also touches on the kickback

1 convictions that while aren't the focus of what's here today,  
2 but have arisen through the course of the investigation here?

3 MR. REAP: Well --

4 THE COURT: I mean, this isn't the only prosecution  
5 that arose out of --

6 MR. REAP: Right. There were five -- let me count  
7 and make sure -- one, two, three, four individuals from  
8 customers who were prosecuted. A fifth individual, one of the  
9 sons, Timothy, was prosecuted for those matters.

10 And the other thing -- well, but they knew of the two  
11 prongs of the investigation very early after the court-ordered  
12 search warrant.

13 MR. HARLAN: Your Honor, there were a number of  
14 forensic investigations conducted. The one that we're talking  
15 about here related only and solely to identifying the amount  
16 of the embezzlements, the method for the embezzlements so the  
17 company could establish internal controls and prepare  
18 financial statements.

19 I will tell you that the company spent a great deal  
20 of money conducting forensic investigations relating to the  
21 spurious tax allegations, but those are separate and apart.  
22 They are not included in this \$200,000. And they had a  
23 completely --

24 THE COURT: What about the kickback investigations  
25 that resulted in five convictions?

1 MR. HARLAN: We did not -- we conducted  
2 investigations of those, Your Honor, but not through the  
3 forensic accounts. They had nothing to do with those.

4 THE COURT: I mean, if you do a forensic accounting  
5 of the books of the company that's a victim, in part, or even  
6 perhaps if everything I read is a participant actively in the  
7 kickback investigations, how do you parse out the embezzlement  
8 conduct from the kickback conduct?

9 MR. HARLAN: I think factually --

10 THE COURT: Oh, do you ignore this while you're  
11 looking at the books of the company but only look at this? I  
12 mean, how do you do that?

13 MR. HARLAN: I think that the two are factually  
14 unrelated.

15 THE COURT: But if you're looking at the books of the  
16 company, how do you isolate that and say when you do an  
17 analysis of the books and records of the company, you're  
18 not -- you just ignore that part of it?

19 MR. HARLAN: Well, I won't say that we ignored that  
20 part of it, Your Honor, but that was not part of this  
21 investigation. This investigation was directed solely to  
22 embezzlements.

23 MR. REAP: If I may add one thing to this dialogue,  
24 we certainly looked at the books and records of the company as  
25 to how they posted these payments out of City Lighting to

1 certain customers, and frankly, we don't know -- we don't  
2 believe they were accurately reported. Now, that's kind of  
3 part and parcel of this tax situation.

4 And bear in mind by pure coincidence there was a  
5 civil -- random civil audit that was in play as Mr. Vierling  
6 was coming to us. That obviously was put on hold. But the  
7 City Lighting Company and the principals at the company knew  
8 about that because that was mailed to them. As to part of  
9 their company in the undercover investigation, there's a  
10 substantial dialogue on that issue.

11 But you know, finally, one other thing -- and I  
12 suggest in my sealed documents -- that a victim's got a lot of  
13 rights, arguably rights, we will attempt to do the best we can  
14 on this issue as we always do, but they also have private  
15 recourse on this issue. They can -- obviously, they've hired  
16 a lot of lawyers, both individual and corporate, spent a lot  
17 of money on this --

18 THE COURT: And, apparently, a forensic accountant?

19 MR. REAP: And spent a lot of money for a lot of  
20 reasons, and proper reasons probably, but they can sue Mr.  
21 Vierling on this issue. In that context, as I say in the  
22 sealed documents, there is a 401(k) that Mr. Vierling has, and  
23 Mr. Vierling's lawyers have formally by letters, and I have  
24 informally in dialogue, said, What about the 401(k) going back  
25 to Mr. Vierling? That is still being held. The only response

1 I have seen is there is some belief without any specificity  
2 that there may be fraud involved in the 401(k). I've never  
3 seen that, but that all is again --

4 THE COURT: That's not in front of me.

5 MR. REAP: And relating to the civil.

6 THE COURT: Right.

7 MR. REAP: Potentially.

8 THE COURT: The last thing we want to do is get into  
9 ERISA today if we can help it, but I will. I'm not afraid of  
10 it, but, you know.

11 MR. REAP: Well --

12 THE COURT: But that's not what's in front of me  
13 today, to be candid about that. Anything further?

14 MR. BOXERMAN: Just very briefly. The issue here is  
15 the objection to the presentence report. The presentence  
16 report made a recommendation and a factual statement. We  
17 objected. So that fact, whatever is in the presentence  
18 report, is not evidence. The Eighth Circuit law is really  
19 clear on that.

20 The Government is supposed to put forward evidence if  
21 it wants to support the presentence report. The Government  
22 has told the Court it's not putting forth any evidence.

23 Mr. Harlan is suggesting that notwithstanding that,  
24 there is this affidavit before the Court that maybe, I don't  
25 know if you'd put it in these words, but he says, well, maybe

1 there's your evidence and you can sustain based on that.

2 The problem with that, very much related to what  
3 Mr. Reap said and sort of the comments of the Court as well  
4 is, notwithstanding the affidavit you can't tell how much of  
5 the two hundred is to figure out the embezzlement and how much  
6 is for other purposes. And even though the affidavit says,  
7 oh, it's all for figuring out the embezzlement, that's  
8 demonstrably not the case.

9 And the reason I say that is, the BSW report that  
10 calculates the amount of the embezzlement, and it's the same  
11 amount that Mr. Harlan's client has been putting forth ever  
12 since. That report is dated October 15, 2008. And yet of the  
13 eight invoices that they are trying to seek recovery for, at  
14 least four of those, if my count is any good, four or five are  
15 after October 15. They're after the date of the report. And  
16 that number hasn't changed.

17 So right then and there you can tell that not all of  
18 that two hundred was for figuring out the amount of the  
19 embezzlement.

20 As Mr. Reap says, there were other things going on.  
21 There was the defense of the tax investigation. There was a  
22 meeting in December of 2008 at the U.S. Attorney's office  
23 involving Mr. Reap and IRS, Mr. Harlan, and the accountants.  
24 And the accountants at that meeting made a PowerPoint  
25 presentation defending the tax allegations. They didn't incur

1 all of these monies to figure out the embezzlement. They  
2 incurred it for other things.

3 And it's a failure of proof. If the Court considers  
4 this affidavit to even be in the record for this purpose,  
5 which I'm not sure it is, it doesn't carry the burden of  
6 establishing by a preponderance of the evidence what amount  
7 was directly incurred as a result of the embezzlement. And  
8 for that reason, the objection that we have raised should be  
9 sustained and we should go forward.

10 THE COURT: Anything further? I am concerned if  
11 the -- because the invoices postdate that -- the time of the  
12 determination of the amount of the embezzlement, and knowing  
13 that there were other targets within the sphere of -- based  
14 upon what's before the Court, as to how I'm supposed to parse  
15 the cost of the accounting given all the tax investigation,  
16 the other targets within and outside the company by the IRS  
17 and the U.S. Attorney's office grand jury investigation.

18 Just as a practical matter, I'm kind of taken aback  
19 that we identify \$292,000 in embezzlement but we spent  
20 \$200,000 to do it. That kind of slows you down a little bit,  
21 you know, in terms of just reasonableness.

22 MR. REAP: That's really why we in our plea agreement  
23 said that the best efforts of the litigants -- Mr. Vierling,  
24 the Government -- comes to the conclusion that the loss is,  
25 for mandatory restitution purposes, the 292,000. The law does

1 not demand that we come to a penny, within a penny, or to the  
2 penny of actual. It is that we do our best efforts.

3 Now, in that context, and this is again in the  
4 documents, and I know Mr. Boxerman is going to talk about  
5 this, there is substantial money that is going to flow to the  
6 court through the clerk's office for mandatory restitution,  
7 and that began on day one, August 2007, in the original  
8 dialogue with Mr. Capes, Mr. Boxerman, Mr. Vierling, Mike  
9 Reap, IRS, and FBI representatives where Mr. Vierling agreed  
10 that he would make mandatory restitution. And he has put  
11 substantial money towards that within the last now four years.

12 THE COURT: It is my finding, by a preponderance of  
13 the evidence, that it has not been established that the  
14 forensic accounting bill of \$200,055.20 can be found to be  
15 part of the mandatory restitution in this case. It does, of  
16 course, beg the question about civil liability maybe to Mr.  
17 Vierling for the unlawful withholding of his 401(k) money or  
18 by Mr. Vierling to the victim for other monies that they may  
19 be able to prove by different burden of proof in an  
20 appropriate court of law as to how much has been paid, but  
21 under the criminal law statutes it's my finding that the  
22 mandatory restitution as established by the U.S. Attorney's  
23 office in this case is \$292,323.69.

24 Of course, \$175,000 of that is due to the bonding  
25 company or the insurance companies, leaving -- so we'll have

1 to amend the chart in paragraph 80 because by my calculation,  
2 and after the insurance companies are made whole, there is a  
3 balance due the victim of \$117,323.69. I don't know if  
4 anybody else has done the math, but that's what I've come up  
5 with.

6 All right. The next objection is to paragraph 89.

7 MR. BOXERMAN: Yes, Your Honor. That's the paragraph  
8 that says that probation doesn't know of any reason for  
9 variances. If I think I have a variance, I object to that in  
10 every case. That's their standard language, and that's my  
11 standard objection.

12 THE COURT: Again, that's a recommendation -- that's  
13 their observation. I gather you have a different one.

14 MR. BOXERMAN: Right.

15 THE COURT: That doesn't mean they're wrong or that I  
16 should change that paragraph, but obviously everyone gets a  
17 right to explain to me under 18, United States Code, 3553(a)  
18 as to what, you know, the appropriate sentence is under the  
19 Supreme Court's guidance.

20 Now, obviously, the victim had filed a motion for me  
21 to appoint a special master in this case. I shouldn't ignore  
22 that. I didn't ignore that. But there was nothing about this  
23 embezzlement case that was any different than any other  
24 embezzlement case. And certainly the U.S. Attorney's office,  
25 which has increased its white collar task force in the last

1 few years, with the assistance of the Internal Revenue  
2 Service, the Treasury Department, the FBI, any number of law  
3 enforcement agencies, the postal inspectors filled with  
4 lawyers and accountants are more than capable of coming  
5 forward with the ability to present any evidence the United  
6 States of America wishes to present, and I am perfectly  
7 capable of understanding that testimony and permitting Mr.  
8 Vierling and the victim to put on any evidence to the  
9 contrary, but here we are. There's no reason to appoint or  
10 was no reason at any time in this case to appoint a special  
11 master. This isn't any more complicated than any other  
12 embezzlement case.

13 The only complication is apparently there were a  
14 large number of people who were involved in illegal activity  
15 within and without this company, and that's a prosecution  
16 determination to be made by the United States Attorney's  
17 office but doesn't affect my ability to understand basic  
18 concepts of addition and subtraction, which in this case led  
19 to embezzlement and it wasn't just mere subtraction. So any  
20 of those motions that are pending as to the need for a special  
21 master in this case are obviously denied.

22 As a result, we have ruled on all of the objections  
23 filed by Mr. Vierling. Any objections to the factual  
24 statements in the presentence report on behalf of the United  
25 States Attorney?

1 MR. REAP: No, Your Honor.

2 THE COURT: The factual statements in the presentence  
3 report as amended here, based upon the objections that have  
4 been filed and ruled upon, are adopted as the findings of fact  
5 in this proceeding.

6 The next step is to determine if the probation  
7 officer -- are there any objections to the probation officer's  
8 application of the sentencing guidelines to the facts of this  
9 case on behalf of Mr. Vierling?

10 MR. BOXERMAN: No, Your Honor.

11 THE COURT: Any objections to the probation officer's  
12 application of the sentencing guidelines to the facts of the  
13 case on behalf of the United States Attorney?

14 MR. REAP: No objection.

15 THE COURT: Mr. Vierling, as you know, I'm sure  
16 you've gone over this countless times with your counsel, you  
17 have a total offense level of 18 and a criminal history  
18 category of 1. The guidelines would recommend a period of  
19 incarceration of 27 to 33 months, supervised release of two to  
20 three years, a fine of \$6,000 to \$60,000. As we have  
21 established today, there is mandatory restitution due in the  
22 amount of \$292,323.69, and there is a special assessment due  
23 today in the amount of \$100.

24 The next step is to determine if there are any  
25 departure motions under the guidelines. Are there any

1 departure motions on behalf of the United States Attorney?

2 MR. REAP: Yes, Your Honor. We did file such a  
3 motion under seal. Mr. Boxerman got a copy of that. The  
4 Court got a copy of that. The victim did not. And frankly,  
5 we don't think the victim has the right to see that motion.

6 THE COURT: Any departure motions on behalf of Mr.  
7 Vierling?

8 MR. BOXERMAN: No, we did not file any departure  
9 motions. There are some factors that we would argue for  
10 variances that maybe could have been departure motions, but  
11 we'll argue them as variance factors, Your Honor.

12 THE COURT: All right. And finally, Mr. Vierling, as  
13 your attorney has alluded to, there is a statute, 18, United  
14 States Code, 3553(a), that lists a number of factors I'm  
15 required to consider before I can determine the appropriate  
16 sentence in your case.

17 With that being said, save for allocution or  
18 discussion of those sentencing factors, does either attorney  
19 know of any reason why we should not proceed to the imposition  
20 of sentence?

21 MR. REAP: No, Your Honor.

22 MR. BOXERMAN: No, Your Honor.

23 THE COURT: I don't know where I picked it up. I  
24 don't know, maybe Mr. Harlan called my office, but I thought  
25 at some point the victim wished to address the Court.

1 Probably better to do that before we get to allocution than  
2 afterwards.

3 MR. HARLAN: That's correct, Your Honor.

4 THE COURT: Or a representative of the victim,  
5 depending on how you define the word "victim" in this case.

6 MR. HARLAN: Your Honor, this is Mr. Lester Hohl, who  
7 is the chairman of CLP Corporation.

8 THE COURT: Very good.

9 MR. HARLAN: And one of the victims.

10 MR. HOHL: As Dave said, my name is Lester Hohl. I'm  
11 the president of City Lighting Products, have been for the  
12 last 37 years. Mr. Vierling was our chief financial officer  
13 from 1991 to 2007.

14 Our relationship goes back many years. I played  
15 basketball against his father when he was at South Side  
16 Catholic High School and I was at St. Louis U. High. We -- in  
17 the early fifties, as a matter of fact, we grew up, our kids  
18 grew up in the same parish, Our Lady of Providence, went to  
19 the same school, and that's a reason I hired Mr. Vierling,  
20 because of the relationship. I hired him away from our public  
21 accounting firm. I remember watching him pitch at Afton High  
22 School when he was 12 or 13 years old.

23 But it's been four years and 24 days since I last  
24 laid eyes on you, and it was a harrowing day --

25 THE COURT: You need to address me. We don't address

1 other people in the courtroom, okay? To keep it civil, you  
2 talk to the Court. You don't talk to individuals.

3 MR. SHORT: All right. It was a harrowing day, and  
4 the consternation, grief, and suffering caused by Mr. Vierling  
5 meant many sleepless nights for my family and all our  
6 employees throughout this ordeal.

7 By his breach of trust, he fooled everyone. He  
8 fooled the whole family. He fooled his co-workers at City  
9 Lighting Products. He fooled our vendors. He fooled our  
10 longtime corporate attorney, John McCartney, and he fooled our  
11 banks where we had our line of credit.

12 Every day that he came to work was a lie. He  
13 misrepresented himself with a facade to his fellow co-workers,  
14 seeking -- while seeking additional ways to steal. He had our  
15 total trust as a chief financial officer. To this day, we  
16 don't know how much he embezzled beyond the \$493,000 that was  
17 discovered by Brown Smith Wallace, the forensic accounting  
18 firm.

19 City Lighting Products spent over \$2 million to  
20 defend his accounting negligence and fabricated accounting  
21 principles which were presented to the federal government.  
22 It's a tribute to our associate's employees and to our  
23 customers that they have stayed with us throughout this  
24 turmoil. We were battered and bloody, but we're still  
25 standing.

1 I hope that every day the rest of his life he  
2 remembers these words: That he betrayed me, he betrayed my  
3 family, and he betrayed the co-workers and employees, the 80  
4 people that worked for our company.

5 Thank you, Your Honor.

6 THE COURT: Thank you, sir. Allocution. I take it,  
7 Mr. Harlan, that was --

8 MR. HARLAN: That was it, Your Honor.

9 THE COURT: Thank you, sir.

10 Mr. Vierling, this is allocution. You have the  
11 opportunity to speak. You can speak directly, you can ask  
12 your attorney to speak for you, or you both may speak, however  
13 you see fit, but if there's anything you would like to say  
14 today, now is the time.

15 THE DEFENDANT: Yes, sir. First I want to say, Your  
16 Honor, that I am truly sorry, ashamed, and remorseful for my  
17 actions while working for this company. And I also want to  
18 apologize to my family for the stress and anxiety I've put  
19 them through during this time.

20 When I went to see Mr. Capes and Mr. Boxerman over  
21 four years ago, I came with the intent to clear my conscience,  
22 to do the right thing, to tell the absolute truth, and then to  
23 suffer -- take whatever consequences would come my way, and I  
24 wanted to get out from the cloud of deceit and lies.

25 So I went and I made a confession, and I proceeded to

1 go to Mr. Boxerman and Mr. Capes, and I laid out the good, the  
2 bad, and the ugly of my actions and the actions of the  
3 company.

4 And it's been four long years, been the four longest  
5 plus years of my life and my family's life. I want to  
6 apologize to my wife and my children, and I -- but I've never  
7 regretted coming forward. I've done the right thing, I've  
8 told the absolute truth every step of the way, and I'm asking  
9 for your mercy in that regard today, sir. Thank you.

10 THE COURT: Mr. Boxerman?

11 MR. BOXERMAN: Your Honor, I filed a sentencing memo  
12 in the case. I know the Court has read it. I know how  
13 seriously this Court and all the judges of this court take  
14 sentencing. I don't think there's any purpose to be served in  
15 me repeating what I put in the sentencing memo.

16 I'm standing before you on behalf of Mr. Vierling,  
17 clearly and unambiguously asking for a sentence of probation  
18 in this case. There's a downward departure motion. His  
19 departure was extraordinary. I think you can get to probation  
20 based on that. Five guilty pleas, wearing a wiring, hours and  
21 hours meeting with the Government at their beck and call.

22 He -- Mr. Reap -- at one time said it would be a  
23 gold-plated 5K, and I think that's what it is, not because  
24 Mr. Reap wanted to make it gold plated, but his assistance was  
25 gold plated in this case, and it should provide the basis for

1 a substantial departure downward and I would say a departure  
2 downward to probation.

3 On top of that, we have the 3553 factors, and I set  
4 them out in the sentencing memo. I will just tick them off.  
5 The fact that Mr. Vierling came forward to confess his own  
6 conduct to the Government before there was any kind of  
7 investigation. The fact that he set aside the restitution  
8 money before being charged. The fact that he fixed his income  
9 tax situation before the IRS coming forward and telling him to  
10 do that.

11 The long period of time that this nature has -- that  
12 this matter has gone on and the just unbelievable stress that  
13 he's been under and his family's been under, and of course,  
14 some of that is of his own doing. I mean, when you commit the  
15 acts he committed and then you confess them and face the  
16 consequences, there's going to be a period of stress, but  
17 these cases don't take four years while you wait to see what's  
18 going to happen to you typically, but this one did. I'm not  
19 saying it's anyone's fault that this one did, but this one  
20 did.

21 This is truly an extraordinary case in many ways, and  
22 the sentence should reflect that. There should be a sentence  
23 of probation in this case, and we urge the Court in the  
24 strongest terms possible to impose that sentence and place Mr.  
25 Vierling on probation. Thank you, Your Honor.

1                   THE COURT: Mr. Vierling, have you had the  
2 opportunity, sir, to say everything you wanted to say?

3                   THE DEFENDANT: Yes, sir, Your Honor.

4                   THE COURT: Has your attorney spoken fully on your  
5 behalf?

6                   THE DEFENDANT: Yes, sir.

7                   THE COURT: Anything on behalf of the United States  
8 Attorney?

9                   MR. REAP: Judge, no. I will reference Mr.  
10 Boxerman's documents relating to variance and also my motion  
11 that are both under seal. I think they say it. I guess I can  
12 say I might have used that term "gold plated," but I will at  
13 least say this. This is not a cosmetic 5K. There was some  
14 truly, as the law demands, substantial assistance in this  
15 case. It led to five convictions and his own, and also some  
16 substantial restitution that's going to go back to the victim  
17 as he promised from day one, August 7 of '07 -- or not August  
18 of '07. I don't know the real specific date.

19                   THE COURT: The statute says that in fashioning an  
20 appropriate sentence in any case, I need to consider the  
21 nature and circumstances of the offense. We heard it today,  
22 and I'm sure Mr. Vierling understands and appreciates the term  
23 "betrayal" and the abuse of trust that brought him to the  
24 moment that he needed to confess.

25                   Trust is one of those things we rely on, perhaps take

1 for granted, but when it's gone tarnishes everything. The  
2 history and characteristics of the defendant. It's a hard  
3 one. Obviously, many good things and many bad things go into  
4 bringing us to this moment. There is the more defining moment  
5 four years ago that recharted a path.

6 Reflect the seriousness of the offense. Can't  
7 underestimate or understate the seriousness of the offense.  
8 Promote respect for the law. I don't think that's been lost  
9 here, and I suspect I will never see Mr. Vierling again,  
10 hopefully no one else in the room.

11 Provide just punishment, afford deterrence.  
12 Deterrence is both personal and societal as to the individual  
13 and a message to others. And protect the public from future  
14 crimes. I don't think that's a factor that has much effect on  
15 any determination today.

16 The overriding consideration or the substantial  
17 consideration is the fact that he provided substantial  
18 assistance to the United States in prosecuting five other  
19 individuals for their misconduct, conduct that may have never  
20 come to light. I don't know what would have come of this  
21 civil audit by the IRS, but obviously any time kickback  
22 schemes are exposed, they were designed to never be exposed,  
23 and it takes a participant, or someone who is familiar with  
24 the allegations, to ever put things right again.

25 And to provide substantial assistance in that regard

1 has to be -- well, certainly the United States benefits, the  
2 people benefit when someone realizes the wrongfulness of their  
3 conduct and is prepared to take the consequences but to  
4 correct it.

5 As a result -- and unwarranted sentencing  
6 disparities. There are 5K1s and there are 5K1s. Sometimes  
7 people just tell on their friends, if you will, and they get a  
8 5K1. Other times they wear wires, they proactively get  
9 involved with the United States and the FBI and others to do  
10 the right thing.

11 In this case we have a more extraordinary 5K1, if you  
12 will, than a, you know, just tell us what you know in a  
13 one-hour proffer. A lot more happened here than that.

14 As a result, it is my finding that a sentence of five  
15 years' probation satisfies the statutory purposes of  
16 sentencing, and sentence will be imposed as follows: Pursuant  
17 to the Sentencing Reform Act of 1984 and the provisions of 18,  
18 United States Code, 3553(a), Stephen Vierling is hereby  
19 committed -- placed on probation for a period of five years.

20 It's further ordered that pursuant to 18, United  
21 States Code, 3663(a), you're to make restitution in the total  
22 amount of \$292,323.69. \$117,323.69 is due to City Lighting  
23 Products. \$150,000 is due to Hartford Fire Insurance Company.  
24 \$25,000 is due to CNA Continental Casualty Company.

25 Now, I'm sure your attorney has talked to you about

1 this, but you are to make restitution to the clerk of the  
2 court. We'll transfer the money to the victims so there's no  
3 dispute, confusion at a later time as to how much was paid and  
4 to whom it was paid.

5 All criminal monetary penalties are due in full  
6 immediately and are payable -- well, they're due and payable  
7 in full within 30 days. You are to pay the criminal monetary  
8 penalties through the clerk of the court. If you cannot pay  
9 in full immediately -- I mean, what is the situation of  
10 restitution? Do I need to make a payment plan, or is it going  
11 to be paid?

12 MR. BOXERMAN: Well --

13 THE COURT: There was suggestion here that a  
14 substantial amount of it was ready to be --

15 MR. BOXERMAN: \$273,000 and some change is set aside.  
16 If the Court ordered me to do it today, I could do it,  
17 although it would probably be next week in the normal course  
18 of the --

19 THE COURT: No. I gave you 30 days to make  
20 restitution.

21 MR. BOXERMAN: All right. So that will leave just  
22 under \$20,000. And we don't need a payment plan on that, Your  
23 Honor.

24 THE COURT: Okay. Well, if it's not paid, obviously,  
25 that comes out to -- over the five-year probation, it comes

1 out to \$4,000 a year. So let's say \$400 a month beginning 30  
2 days from today if it isn't paid in full.

3 Until all criminal monetary penalties are paid in  
4 full, you are to notify the U.S. Attorney's office of any  
5 material changes in your economic circumstances that might  
6 affect your ability to pay. You are to notify the U.S.  
7 Attorney's office of any change in your mailing or residence  
8 address that occurs while any portion of the money remains  
9 unpaid.

10 Now, I'm not going to impose a fine, but I am going  
11 to impose 200 hours of community service to be directed by the  
12 probation office.

13 Now, while on probation you are to comply with the  
14 standard conditions adopted by this court and with the  
15 following additional conditions: You are required to submit  
16 your person, residence, office, or vehicle to a search by the  
17 probation office based upon a reasonable suspicion of  
18 contraband or evidence of a violation of any condition of your  
19 release, and warn anyone else who resides with you -- and that  
20 would include your computer -- warn anyone else who resides  
21 with you they are subject to the search condition as well.

22 You should participate in a mental health treatment  
23 program if directed to do so by the probation office and pay  
24 for that based upon your ability to pay.

25 You are to provide the U.S. Attorney's office access

1 to any and all requested financial information. You are  
2 advised they may share that information with the probation  
3 office.

4 You may not open any new credit charges or additional  
5 lines of credit without the express written permission of the  
6 probation office as long as any of the money remains unpaid.  
7 If you receive any monies from tax refunds or any other  
8 financial gains, you are to pay that money to the probation  
9 office -- pay that money towards the restitution and notify  
10 the probation office immediately if you receive any such  
11 money. You are, of course, to pay the restitution as ordered.

12 Based on your low risk for future substance abuse --  
13 typically, I'm required to order substance abuse testing.  
14 That's mandatory. But I can suspend that if there's no  
15 evidence of prior substance abuse, and I'm going to suspend  
16 the mandatory statutory drug testing requirements.

17 It's further ordered that you are to pay to the  
18 United States a special assessment in the amount of \$100 which  
19 is due today.

20 Are there any objections to the Court's findings of  
21 fact, conclusions of law, or the manner in which the sentence  
22 was pronounced?

23 MR. BOXERMAN: None from us, Your Honor.

24 MR. REAP: No, Your Honor.

25 THE COURT: Sentence will be imposed as stated.

1                   Mr. Vierling, if you want to appeal, you need to do  
2 so within 14 days. Your attorneys will file the notice for  
3 you if you ask them to do so. If for some reason you can't  
4 get that done, you can ask the clerk of the court and he'll  
5 file it. If you cannot afford the filing fee, it is possible,  
6 upon a proper motion, the fee would be waived.

7                   Any other matters for the Court's consideration  
8 today?

9                   MR. BOXERMAN: None from us, Your Honor.

10                  MR. REAP: No, Judge.

11                  THE COURT: All right. Thank you.

12                  **(PROCEEDINGS CONCLUDED AT 11:50 AM.)**

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CERTIFICATE

I, Shannon L. White, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 32 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 12th day of December, 2011.

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/s/Shannon L. White  
Shannon L. White, RMR, CRR, CCR, CSR  
Official Court Reporter